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No. 99-471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

SAMUEL AND CHERYL SANDAGE
Petitioners,

v.

BANKHEAD ENTERPRISES, INC.
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERITIORARI

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QUESTIONS PRESENTED

(1) Whether certiorari is appropriate for the sole purpose of reviewing a federal court of appeals' application of state law in a diversity case.

(2) Whether the record supported the appellate court's holding that, as a matter of law, an auto hauler trailer was not defective and unreasonably dangerous simply because a person positioning a car next to a support post might not be able to open fully the car door.

PARTIES BELOW

Petitioners Samuel Sandage and Cheryl Sandage were plaintiffs in the district court and appellees in the court of appeals. Respondent Bankhead Enterprises, Inc. was a defendant in the district court and appellant in the court of appeals. Cottrell, Inc. was a defendant in the district court but was not a party to the proceeding in the court of appeals.

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STATUTORY PROVISIONS INVOLVED

Missouri Revised Statutes §537.765 (1994) is accurately quoted by petitioners. However, respondent disagrees that §537.765 is implicated by the court of appeals' holding in this case.

STATEMENT OF THE CASE

As of December 17, 1990, petitioner Samuel Sandage had been working for almost ten years as a driver of tractor-trailers used to transport automobiles. Petitioner's Appendix at A-2 ("A-2"). Mr. Sandage had loaded as many as approximately 2700 cars each year. *Id.* On December 17, 1990, he was loading vehicles onto a Cottrell Model CS-11 trailer, manufactured by Cottrell, Inc. A-3. As originally manufactured, the CS-11 carried up to eleven vehicles, to be loaded at various numbered positions on the trailer. A-2. At the request of Cassens Transport, Mr. Sandage's employer, the CS-11 had been modified by respondent Bankhead, which had added four feet to the length of the trailer, so that the trailer might hold more and larger vehicles. *Id.*

Mr. Sandage claimed that he was injured when loading a car into the number one position on the modified CS-11. A-3. Mr. Sandage could not remember whether he drove the car forward onto the trailer or backed it in or how far toward the front of the trailer he positioned the car. A-3. Mr. Sandage testified he was unable to open the car door all the way because he had placed it next to a support post. *Id.* At trial, however, Mr. Sandage was unable to say whether the door he was attempting to open was blocked by the original support post that had been on the unmodified Cottrell trailer or by the supporting material added by Bankhead. Mr. Sandage testified that he was injured when he attempted to "squeeze" out of the partially opened door. A-3.

Petitioners claimed that the trailer as modified by Bankhead was defective and unreasonably dangerous because it was possible to place a car in the number one position such that the driver's door could not be opened wide enough to allow safe egress from the car.

In denying Bankhead's motion for judgment as a matter of law, United States District Judge George Gunn stated that the

case was very close, but that he intended to submit the case to the jury because he believed that is what the Eighth Circuit would prefer.

On appeal, the United States Court of Appeals for the Eighth Circuit held that plaintiffs had failed to make a submissible case on their claim of strict liability or negligent design defect. The court held that the trailer was not defective and unreasonably dangerous as a matter of law and that Bankhead was entitled to judgment in its favor. A-4 - A-9.

Contrary to petitioners' statement of the case, the Eighth Circuit did not hold that the "defect was 'open and obvious.'" Petition at 3. The court of appeals did not find that there was any "defect." The court also recognized that any danger associated with the location of support posts and loading cars was patent. A-5 - A-8.

REASONS FOR DENYING THE WRIT

1. CERTIORARI SHOULD NOT BE GRANTED FOR THE SOLE PURPOSE OF DECIDING A STATE LAW QUESTION RULED UPON BY A FEDERAL COURT OF APPEALS.

While admitting that this Court normally does not grant petitions for certiorari solely to review a federal court's application of state law, petitioners claim that this case presents one of those rare circumstances when such review is justified. Petition at 4. Clearly it does not. The Eighth Circuit's judgment involves nothing more than the type of interpretation and application of state law that is commonplace in diversity cases, and is exactly the type of judgment for which certiorari is not appropriate.

Leavitt v. Jane L., 518 U.S. 137, 116 S.Ct. 2068 (1996), on which petitioners rely, offers no support for granting certiorari in this case. In *Leavitt*, the court of appeals had invalidated an entire Utah abortion statute based on a finding that one section was unconstitutional and that other sections were not severable. 518 U.S. at 139-40. The court of appeals reached this conclusion despite a state statute explicitly stating that the statutory provisions were severable. *Id.* In granting certiorari, this Court specifically noted that the effect of the court of appeals' decision was to make a state statute completely unenforceable, on constitutional grounds, anywhere in the state. 518 U.S. at 144-45. The Court also noted the national importance of the underlying substantive issue. *Id.* at 145. On the other hand, the Eighth Circuit's interpretation and application of Missouri product liability law to Mr. Sandage's claim has no such statewide impact or national significance.

Petitioners also criticize the Eighth Circuit panel, "consisting of judges from South Dakota, Nebraska, and Minnesota," for reversing "an Eastern District Court of Missouri on a point of Missouri law." Petition at 4. As this Court held in *Salve Regina*

College v. Russell, 499 U.S.225, 231, 111 S.Ct. 1217, 1220-21, 113 L.Ed.2d 190 (1991), the court of appeals is to review the district court's determination of state law *de novo*, without deference.

In addition, the record contradicts petitioners' suggestion that the district court unequivocally rejected Bankhead's motion for judgment as a matter of law filed at the close of the evidence. In fact, in response to Bankhead's motion, the district court openly expressed its uncertainty about whether petitioners had made a submissible case. The district court, however, decided that the most efficient resolution of its uncertainty was to submit the case to the jury and let the Eighth Circuit finally resolve the issue of submissibility.

> THE COURT: Well, I think the whole case is extremely close. I'm going to go ahead and let it go to the jury because I think the Eighth Circuit would rather have it that way than my ruling on a judgment as a matter of law, and if I'm wrong, then the case would have to be tried all over again. If I'm – if we let it go to the jury, then they can say I was either wrong in letting it go to the jury or affirm what the jury does, so we'll let it go to the jury.

Tr. 4-56. The Eighth Circuit did not undermine the district court's assessment, but rather conducted exactly the type of independent review the district court expected.

2. THE EIGHTH CIRCUIT'S HOLDING IS CONSISTENT WITH MISSOURI PRODUCTS LIABILITY LAW.

As petitioners interpret Missouri product liability, the trial and appellate courts no longer have any authority to determine, as a matter of law, whether a plaintiff has made a submissible claim that a product is defective and unreasonably dangerous. The

cases cited by petitioners do not support such a rigid narrowing of the role of the courts in reviewing a plaintiff's case. In fact, when a party challenges submissibility, the court of appeals is not only entitled but obligated to determine whether plaintiff has made a submissible design defect case. Both before and after the enactment of §§ 537.760 and 537.765 RSMo (1994), the determination of whether a product is defective and unreasonably dangerous includes consideration of whether the alleged "defect" is open and obvious and whether any danger associated with the use of the product exceeds that reasonably anticipated by the ordinary consumer of the product. *See Miller v. Varity Corp.*, 922 S.W.2d 821, 825 (Mo. App. 1996) (open and obvious nature of a claimed defect can be properly considered); *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 153-54 (Mo. banc 1998) (although Missouri courts have not expressly adopted the consumer expectation test, it remains one of the theories of unreasonably dangerous).

Petitioners apparently argue that, no matter how obvious and fundamental the characteristics of a product, a court may never hold that the product is not defective or unreasonably dangerous as a matter of law. The cases cited by petitioners do not so hold. The fact that determinations of "defect" and "unreasonable danger" may regularly be jury issues does not mean that they are *always* jury issues, just as the fact that negligence is generally a jury issue does not mean that a court is precluded from ever directing a verdict in a negligence case. As it is obligated to do in the face of a claim that plaintiff failed to make a submissible case, the Eighth Circuit reviewed the relevant evidence and properly concluded, as a matter of law, that the CS-11 was not defective and unreasonably dangerous simply because it was possible to load a vehicle near a support post.

Petitioners argue that the Eighth Circuit erred in citing *Pree v. Brunswick Corp.*, 983 F.2d 863 (8th Cir. 1993) and *Linegar v. Armour of Am., Inc.*, 909 F.2d 1150, 1154 (8th Cir. 1990), because

both of those causes of action arose prior to the effective date of the Missouri products liability statute, § 537.760, *et seq.*, RSMo (1994). Bankhead cited and discussed both *Pree* and *Linegar* in its opening brief in the Eighth Circuit. In their appellees' brief filed in the Eighth Circuit, however, petitioners *never* mentioned, much less attempted to distinguish, either *Pree* or *Linegar*, and *never* argued that the holdings in those cases were no longer valid after passage of Missouri's product liability statute. Petitioners first made that argument in their petition for rehearing.

Petitioners also overstate the impact of § 537.765, which abolished contributory fault as a complete bar to recovery and adopted comparative fault in strict product liability cases. Petition at 1-2. On its face, § 537.765 addresses the fault of the plaintiff, necessarily involving a subjective analysis of the individual plaintiff's knowledge, not the issue of whether the condition of the product is open and obvious as a matter of law, an objective analysis. Again, in their brief filed in the Eighth Circuit, petitioners never argued that the open and obvious condition of a product is relevant only to comparative fault under § 537.765. Rather, in their Eighth Circuit brief, petitioners referred to § 537.765 only in response to Bankhead's discussion of Mr. Sandage's substantial personal experience in loading trailers, which petitioners characterized as an assumption of risk defense. Petitioners should not be permitted to seek certiorari based on an analysis of § 537.765 not contained in their brief in the court of appeals.

Petitioners mischaracterize the holding and analysis of the Missouri court of appeals in *Wilson v. Danuser Machine Company, Inc.*, 874 S.W.2d 507 (Mo. App. S.D. 1994). Petition at 6. The court in *Wilson* did not consider § 537.765 with regard to plaintiff's claim that the log splitter was defective and unreasonable dangerous. The Court in *Wilson* discussed § 537.765 only in the context of plaintiff's claim that defendant Danuser had failed to make a submissible case of comparative fault. The

Wilson court's discussion of submissibility never mentions §537.765, but rather focuses on whether plaintiff was required to show that the product had failed or malfunctioned. Moreover, in affirming the judgment, the court of appeals in *Wilson* also discussed *Linegar v. Armour of America, Inc.*, 909 F.2d 1150, one of the cases cited by the Eighth Circuit in this appeal. In distinguishing *Linegar*, the court in *Wilson* never suggests that the holding or rationale in *Linegar* had been undermined by the enactment of § 537.765. *Wilson* simply does not support petitioners' argument that the Eighth Circuit misapplied Missouri law.[1]

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[1] Petitioners request that, on grant of certiorari, they are entitled to "reversal of the judgment of the Eighth Circuit and a remand with instructions to reinstate the verdict of the jury and the judgment of the trial court." Petition at 8. Even were the Court somehow to conclude that it should grant certiorari solely to review the Eighth Circuit's application of Missouri common law and further that the Eighth Circuit had erred in applying that law, petitioners still would not be entitled to reinstatement of the judgment of the trial court. In addition to demonstrating that the modified trailer was neither defective nor unreasonably dangerous, Bankhead also raised substantial issues concerning petitioners' failure to prove causation and the trial court's erroneous admission of plaintiff's expert's testimony. Because of its holding, the Eighth Circuit did not reach these issues.

CONCLUSION

The Eighth Circuit's reversal of the district court's judgment reflects a proper application of Missouri product liability law to the facts of this case, and does not "nullify a Missouri statute [or] attempt to re-create federal common law." Petition at 8. For the reasons stated, certiorari should be denied.

Respectfully submitted,

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